

SERVICE DATE – OCTOBER 30, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35087 (Sub-No. 8)

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK  
CORPORATION—CONTROL—EJ&E WEST COMPANY

Digest:<sup>1</sup> The Board denies reconsideration of an April 2017 decision to deny a petition to reopen the Board's 2008 approval of Canadian National Railway Company's acquisition of EJ&E West Company filed by the Village of Barrington, Ill. (Barrington), and the Illinois Department of Transportation. Barrington has not established that the Board materially erred when it denied the petition to reopen, nor has Barrington presented new evidence that would warrant reconsideration of the April 2017 decision.

Decided: October 27, 2017

BACKGROUND

*2008 Acquisition Transaction.* In 2008, the Board approved the acquisition of control by Canadian National Railway Company and Grand Trunk Corporation (collectively, CN) of EJ&E West Company (EJ&E), a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company, subject to environmental and other conditions. Canadian Nat'l Ry.—Control—EJ&E West Co., FD 35087 (STB served Dec. 24, 2008) (2008 Final Decision), aff'd sub nom. Vill. of Barrington v. STB (Barrington I), 636 F.3d 650 (D.C. Cir. 2011). The approval was subject to a five-year monitoring and oversight period to allow the Board to closely examine various impacts of the transaction.<sup>2</sup>

As part of the Board's review of CN's application to acquire control of EJ&E, the Board conducted an environmental review in accordance with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. The Board's Office of Environmental Analysis (OEA) prepared an Environmental Impact Statement (EIS) examining the potential environmental effects of the transaction, including an extensive analysis of the transaction's potential impact on highway/rail

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Through subsequent decisions the Board extended the oversight period, which concluded on January 23, 2017. See Canadian Nat'l Ry.—Control—EJ&E W. Co., FD 35087, slip op. at 5 (STB served Dec. 17, 2014) (with Board Member Begeman dissenting).

at-grade crossings along the EJ&E rail line. Using CN's estimates for projected train traffic on the EJ&E line for the year 2015, which accounted for proposed upgrades to the line that would be completed before 2015, OEA examined the potential impacts on all 112 crossings along the EJ&E line, including the crossing at U.S. Route 14 (U.S. 14) in Barrington. Based on criteria used in the EIS to evaluate which acquisition-related crossings were "substantially affected,"<sup>3</sup> and therefore eligible for possible mitigation, OEA recommended mitigation for eight of the 112 crossings and found a grade separation to be appropriate mitigation for two crossings, at Ogden Avenue in Aurora, Ill., and Lincoln Highway in Lynwood, Ill. Based on OEA's analysis and recommendations, the Board concluded, in a judicially affirmed decision, that the intersection at U.S. 14 in Barrington did not meet the Board's criteria for a "substantially affected" crossing, much less for a grade separation mitigation condition, as any traffic issues would be primarily the result of preexisting conditions. See 2008 Final Decision, slip op. at 45 & n.101, aff'd Barrington I, 636 F.3d at 672.

*2011 Petition by the Village of Barrington.* In 2011, the Village of Barrington (Barrington) petitioned the Board, pursuant to its continuing oversight jurisdiction, to require CN to pay for a grade separation at U.S. 14 as a mitigation condition of the 2008 transaction. In support of its request, Barrington submitted an updated version of a VISSIM traffic impact study that it had submitted to the Board in 2008.<sup>4</sup> Barrington argued that the 2011 traffic impact study showed that U.S. 14 would experience over 40 hours of total vehicle delay in a 24-hour period, thus exceeding one of the three criteria used by the Board for determining "substantially affected" crossings. By decision served on November 8, 2012 (2012 Decision), the Board denied the petition, finding that Barrington had not presented new evidence or changed circumstances that would have materially altered the Board's conclusions in the 2008 Final Decision regarding appropriate mitigation at U.S. 14. The Board explained that exceeding one or more of the threshold criteria for "substantially affected" crossings did not automatically

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<sup>3</sup> A crossing would be considered "substantially affected" if it met or exceeded at least one of three threshold criteria, based on rail and car traffic projections for 2015. The three threshold criteria are: (1) crossing level of service (LOS) (where a crossing was at or over capacity and would be reduced to a Crossing LOS of E or F as a result of the transaction); (2) effects on queue length (where a transaction-related queue length would block another roadway that would not otherwise be blocked); and (3) total amount of delay for all vehicles stopped at a crossing (where a crossing would experience more than 40 hours of total transaction-related vehicle delay in a 24-hour period). (EIS 4.3-8 to 4.3-10, July 25, 2008, Docket No. FD 35087 (Draft EIS).)

<sup>4</sup> VISSIM (a German acronym, which translated means "traffic in towns—simulation") is a microscopic time step and behavior-based simulation program developed to model urban traffic and rail operations. In 2008, in support of its comments on the Draft EIS, Barrington stated that it had prepared its own highway impact VISSIM analysis to analyze and project the total vehicle delay over a 24-hour period at U.S. 14 and Lake-Cook Road in Barrington for 2015, based on the projected train traffic inputs used in the Draft EIS. In 2011, Barrington submitted an updated VISSIM traffic study that updated the 2008 traffic study by adjusting the train traffic inputs to reflect CN's operations in mid-2011.

warrant any mitigation. Rather, the Board had considered a range of evidence, studies, and factors in deciding what mitigation conditions to impose in the 2008 Final Decision. Accordingly, the Board found that the alleged new evidence in the 2011 traffic study would not have changed the outcome of the Board's 2008 decision not to require a grade separation at U.S. 14 because Barrington's vehicle delays were primarily attributable to preexisting traffic conditions and capacity constraints. 2012 Decision, slip op. at 12-13, aff'd sub nom. Vill. of Barrington v. STB (Barrington II), 758 F.3d 326 (D.C. Cir. 2014).

*2014 Barrington Petition to Reopen.* On November 26, 2014, Barrington filed another petition to reopen, asserting that an "unforeseen" surge in energy-related rail traffic on CN's rail network amounted to new evidence and substantially changed circumstances warranting reopening and that, upon reopening, the Board should require CN to pay \$47 million toward the cost of a grade separation at U.S. 14. By decision served May 15, 2015 (2015 Decision), the Board denied Barrington's petition. The Board noted that rail traffic volumes and train lengths on the EJ&E line were close to or lower than the projected levels relied upon by the Board in its 2008 Final Decision. 2015 Decision, slip op. at 4. The Board further explained that, even if that had not been the case, exceeding a certain level of rail traffic did not automatically warrant mitigation under the Board's criteria. Id. at 5. Lastly, the Board concluded that Barrington had not presented any new evidence that would alter the Board's determination that projected vehicular delays at and around U.S. 14 were primarily attributable to preexisting conditions at and around U.S. 14, not the transaction. Id. at 6. By decision served November 4, 2015, the Board denied Barrington's petition for reconsideration of the 2015 Decision.

*2017 Joint Petition to Reopen.* By petition filed January 10, 2017, Barrington and the Illinois Department of Transportation requested that the Board reopen the proceeding to require CN to pay \$37.5 million toward the cost of a grade separation at U.S. 14 and extend the oversight period to January 9, 2019. Petitioners based their request on alleged new evidence and substantially changed circumstances regarding the "current and imminent impacts" of CN's operations on the U.S. 14 crossing that "exceed the adverse impacts that the Board anticipated" in formulating and adopting mitigation in its 2008 Final Decision. (Barrington Pet. 3, Jan. 10, 2017.)

By decision served on April 26, 2017 (April 2017 Decision), the Board denied the joint petition to reopen, finding that the petitioners had not provided new evidence or substantially changed circumstances that would alter the Board's conclusion that U.S. 14 did not meet the Board's criteria for a grade separation mitigation condition. Thus, in response to this fourth request for essentially the same relief, the Board found that neither additional mitigation nor a reinstitution of the oversight period were warranted.

#### CURRENT PETITION FOR RECONSIDERATION

By petition filed on May 16, 2017, Barrington seeks reconsideration of the April 2017 Decision. This time, Barrington requests "only" that the Board reconsider its decision not to require CN to pay the \$37.5 million to complete construction of a grade separation at U.S. 14, not its refusal to extend the oversight period. Barrington asserts that the Board materially erred

by relying on the conclusions made in the 2008 Final Decision—that U.S. 14 did not meet the Board’s criteria to be considered a substantially affected crossing and did not warrant a grade separation mitigation condition, as any traffic issues would be primarily the result of preexisting conditions. (Barrington Pet. 1-2.) Barrington argues that the Board disregarded evidence presented in Barrington’s 2008 and 2011 traffic studies that disproves this determination. (Barrington Pet. 14.) Barrington asserts that “new” evidence demonstrates that U.S. 14 experiences vehicular traffic delay that exceeds the 40-hour threshold criterion for a “substantially affected” crossing and that such vehicular delay is the result of the transaction rather than preexisting conditions. (Barrington Pet. 13.) Further, Barrington faults the Board for relying on monthly train count figures, rather than carload figures, in assessing the impact on crossings in Barrington. Lastly, Barrington asserts that the Board’s approach to future traffic volumes, established in the 2008 Final Decision, is shortsighted, particularly as it pertains to CN traffic movements coming through the Port of Prince Rupert. (Barrington Pet. 15-19.)

On June 5, 2017, CN filed a reply to Barrington’s petition for reconsideration, arguing that Barrington’s request should be denied. CN asserts that Barrington’s claim of material error in the 2008 Final Decision affords no basis for reconsideration of the April 2017 Decision. CN further argues that Barrington reiterates old arguments with no substantiation of its claims of error and that its claims of error do not mandate a different result. CN also asserts that Barrington’s “new” evidence provides no basis for reconsideration, as it merely recalculates old data and does not mandate a different result.<sup>5</sup>

For the reasons discussed below, Barrington’s petition for reconsideration will be denied.

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<sup>5</sup> On September 12, 2017, Barrington filed a motion to supplement its petition, to which CN replied in opposition on October 2, 2017. On October 19, 2017, Barrington filed a reply to CN’s filing. In the interest of a more complete record, the Board will grant Barrington’s request to supplement the record. Barrington alleges that efforts to secure additional federal funds to build a grade separation at U.S. 14 have been hampered by CN’s reporting of inaccurate information to the Federal Railroad Administration (FRA). Barrington also alleges that CN’s statements regarding the Port of Prince Rupert are misleading. In light of these allegations, Barrington urges the Board to examine “on its own motion” the actual number of carloads that have moved through Barrington by using evidence from the 2015 Waybill Sample. To the extent Barrington believes that CN has submitted inaccurate information to FRA, it may raise that issue with FRA or the appropriate agency from which it sought funding. In addition, given that the Board finds (as discussed below) that: (1) there is no material error in using trainload data to determine the impact of CN trains moving through Barrington, and (2) existing capacity constraints at U.S. 14 would contribute much more significantly to the vehicle delays at that crossing than would additional CN trains on the EJ&E, there is no basis for the Board to conduct an independent traffic review, nearly 10 years after the transaction was approved.

## DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that: (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. The Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803, 804 (2004). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Can. Pac. Ry.—Control—Dakota, Minn.& E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error). Moreover, the error must be one that “would mandate a different result.” See Montezuma Grain Co. v. STB, 339 F.3d 535, 541-42 (7th Cir. 2003); Or. Int’l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

Beyond those general principles, in addressing petitions to reopen proceedings involving consummated mergers, the Board also recognizes that new conditions become increasingly inconsistent with notions of commercial certainty and fairness once a merger has been consummated, given that the carrier can no longer choose to walk away from it. Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp., 3 S.T.B. 1030, 1033 (1998). That principle is particularly relevant here, given that this merger was consummated nearly 10 years ago, and that this is the fourth time in that period that Barrington has sought to revisit the Board’s (twice) judicially affirmed decisions.

As discussed below, the Board finds no material error or new evidence supporting reconsideration of the April 2017 Decision.

### Material Error

Barrington’s claims of material error simply repeat arguments that Barrington has made repeatedly in this proceeding. As discussed below, both the Board and the reviewing courts have addressed Barrington’s arguments relating to the Board’s examination in 2008 and 2012 of the need for grade-separation mitigation at U.S. 14, and of Barrington’s 2008 traffic study and its 2011 update. The reviewing courts affirmed the Board’s decisions, and Barrington has provided nothing to change those decisions here. Those long-final decisions were correct, and there is simply no reason to revisit them now. Moreover, the material error arguments Barrington now presents were certainly available to it in its appeal of the Board’s initial decision in this matter, and therefore, they have been waived. Tex. Mun. Power Agency, 7 S.T.B. at 804; see also Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J., AB 167 (Sub-No. 1189X), slip op. at 4 (STB served Aug. 21, 2017) (and cases cited therein) (explaining that arguments first raised in a reopening request that could have been raised during initial proceeding are waived). Although Barrington’s repeated challenges, both at the agency and in court, to the Board’s 2008 Final Decision could be viewed as an attempted end run around the requirement that parties

appeal agency decisions within 60 days, 28 U.S.C. § 2344, the Board will address Barrington's claims of material error and explain why such claims would not change the outcome of the Board's judicially affirmed prior decisions.

*2008 Final Decision.* Barrington asserts that the April 2017 Decision materially erred by relying on findings that the Board made in the 2008 Final Decision, arguing that, in that nine year-old, judicially affirmed decision, "the Board wrongly identified preexisting congestion as the primary factor that caused it to deny grade-separation mitigation to Barrington at [U.S. 14]" and "never explained the basis for that determination." (Barrington Pet. 12.) To the contrary, the Board, which had adopted in the 2008 Final Decision all of the analysis and conclusions in the EIS, provided a thorough explanation for why a grade separation at U.S. 14 would have "minimal benefit to traffic flow" in the area due to existing congestion caused by multiple nearby traffic signals, as well as the nearby location of the UP/Metra rail line that created substantial queuing along Hough Street and U.S. 14. See EIS 4-14 to 4-16, Dec. 5, 2008, Docket No. FD 35087 (Final EIS); see also Final EIS, Appx. A 100 (finding vehicle queueing present at the crossing during peak periods "due to insufficient capacity at these intersections" under the No-Action scenario); Final EIS, Appx. A 102 ("Construction of a grade separation at either crossing location would only be beneficial if capacity improvements are incorporated at the upstream and downstream signalized intersections.")

Barrington also argues that the Board's "preexisting congestion" conclusion—made in 2008—contradicts the determination made in the Board's EIS that U.S. 14 would experience over 30 hours of vehicle delay as a result of CN's acquisition of the EJ&E line, compared to vehicle delay of over 2 hours under the No-Action scenario (i.e., where no new CN trains would be added). (Barrington Pet. 6.) The 30-hour delay finding, however, is consistent with the Board's determination that U.S. 14 was not a "substantially affected" crossing, as the vehicle delay did not exceed the 40-hour threshold. The Board recognized that the transaction would have some incremental impacts on traffic congestion in Barrington but would not considerably worsen traffic congestion or mobility, thereby indicating that, for the most part, congestion conditions were attributable to preexisting capacity constraints. See Final EIS, Appx. A 82-87.

Next, Barrington asserts that the 2008 Final Decision (and the April 2017 Decision) disregarded the findings of the Board's own 2008 VISSIM traffic study that showed adverse impacts of the transaction on queue lengths at crossings in Barrington.<sup>6</sup> (Barrington Pet. 9.) Although the Board's 2008 VISSIM traffic study found that peak period queue lengths would increase, the Board concluded that such increases were primarily caused by high traffic volumes and a preexisting lack of capacity at the intersection of IL 59 and U.S. 14, rather than by the transaction. See Final EIS, Appx. A 100, see also 2012 Decision, slip op. at 19-20.) In fact, the excerpt of the Board's traffic study that Barrington cites attributes the queueing at U.S. 14 to "existing capacity constraints." (See Barrington Pet. 10.) Thus, rather than disregard these

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<sup>6</sup> In response to Barrington's comments on the Draft EIS, and in light of Barrington's preexisting high traffic volume and congestion, the Board's third-party contractor, HDR, performed an additional VISSIM traffic analysis specifically focused on the Barrington area.

findings as Barrington claims, the Board in the 2008 Final Decision considered these findings in concluding that a grade separation was not warranted at U.S. 14.

For these reasons, the Board finds that Barrington fails to present any evidence of material error in the Board's court-affirmed 2008 Final Decision or its April 2017 Decision, including the Board's determination that grade-separated crossing mitigation in Barrington was not warranted and the Board's conclusion that much of Barrington's congestion stemmed from preexisting conditions.

*Barrington's 2008 & 2011 Traffic Studies.* Barrington asserts that the Board, in its various decisions denying Barrington's repeated requests for the same relief, has disregarded the evidence in Barrington's 2008 and 2011 traffic studies, which Barrington asserts disproves the notion that traffic congestion on U.S. 14 is primarily due to preexisting roadway capacity. (Barrington Pet. 14.) To the contrary, in response to the concerns presented by Barrington in 2008, including the conclusions of Barrington's 2008 traffic study, the Board in 2008 conducted its own VISSIM traffic study, as discussed above, that specifically focused on the Barrington area to better understand the interaction between conditions on the local roadways in the Barrington area and the effects of the railroad crossings. (Final EIS 2.5.11.) The study showed that total vehicle delay time in the Barrington region would increase by 4% and 5% during the AM and PM peak periods, respectively, over the No-Action scenario (where no new CN trains would be added.)<sup>7</sup> Based on these findings, the Board acknowledged that the transaction would result in increased vehicle delay, but concluded that the congestion was largely attributable to preexisting conditions. See Final EIS, Appx. A82-87.

Likewise, in the 2012 Decision, the Board gave a thorough examination of Barrington's 2011 traffic study and found not only that the vehicle projections were less than what was projected in Barrington's 2008 traffic study (and thus would not have materially affected the Board's 2008 determination), but that Barrington's own 2011 traffic model showed that preexisting capacity constraints in the Barrington street network would contribute much more significantly to the vehicle delays at that crossing than would additional CN trains on the EJ&E line. 2012 Decision, slip op. at 12. Specifically, Barrington's 2011 traffic study showed that, under the No-Action alternative (where no new CN trains would be added), preexisting capacity constraints in the Barrington street network would cause 260 hours of additional vehicle delay per day at U.S. 14 by 2015. Thus, even if CN's additional trains were to add 98-100 hours of increased vehicle delay at U.S. 14, as Barrington had predicted, Barrington's own model showed that existing capacity constraints on U.S. 14 would contribute much more significantly to the

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<sup>7</sup> See 2008 Final Decision, slip op. at 45 n.101; Final EIS at 2-48-49, Addendum A. Barrington faults the Board's 2008 traffic study for monitoring traffic conditions only during "peak hours." (Barrington Pet. 10.) As the Board noted in its judicially affirmed 2012 Decision, Barrington itself requested that the Board's traffic study focus on AM and PM peak hour conditions "to represent a time period with higher expected traffic volumes and resulting congestion." See 2012 Decision, slip op. at 16-17, citing Final EIS 2-49.

vehicle delays at that crossing than would additional CN trains on the EJ&E line. Id. The Board's findings were upheld on appeal. Barrington II, 758 F.3d at 329.

Accordingly, the Board finds no basis for reconsideration regarding its handling and examination of Barrington's 2008 and 2011 traffic studies.

*Traffic Projections.* Barrington asserts that the total number of rail cars that move through Barrington greatly expanded during the oversight period and that the Board's reliance in the April 2017 Decision on the number of trains (rather than carloads) is misplaced when assessing the impact of CN traffic on the Barrington roadways. (Barrington Pet. 15-16.) Barrington argues that, because these longer trains are also moving at slower speeds, the Board's 2008 projections were wrong, and that in fact there has been an increase in vehicular delay in Barrington. (Barrington Pet. 16.)

The Board finds no material error in the methodology used in 2008 to determine the impact of CN trains moving through Barrington, nor in its assessment of this impact in its April 2017 Decision. It should be noted that the Board had already addressed Barrington's claim regarding the need for the Board to assess the number of carloads rather than trains prior to the filing of Barrington 2017 petition. In 2015, the Board effectively affirmed its 2008 methodology by declining Barrington's request to require CN to report train lengths. The Board found no need to increase the Board's reporting requirements to add data on average train lengths, because CN was already providing detailed data for trains that blocked crossings for 10 minutes or more in its monthly operating reports, which addressed the crux of Barrington's concerns with longer trains on blocked crossings. 2015 Decision, slip op. at 5 n.9.

Barrington has repeatedly argued that, while train counts remained at or below projected monthly train count levels, the increase in train lengths has adversely impacted vehicle delays.<sup>8</sup> But as the Board noted in its April 2017 Decision, longer trains may reduce the overall crossing activation time given that the amount of time a crossing is activated before and after the arrival of each train is fixed, regardless of the train length. April 2017 Decision, slip op. at 7-8. The Board also noted that the train speed through the Barrington Interlocking had been reduced due to safety concerns. Id. at 8. Barrington has not presented sufficient evidence to undermine these determinations or the Board's method for evaluating CN's operations. Therefore, the Board finds no error in how it has assessed the impact of CN trains on crossings in Barrington.

#### New Evidence

Barrington proffers "new" evidence that allegedly demonstrates that vehicle delay at U.S. 14 has increased to 118 hours of daily delay as of spring 2016. To be sufficient to warrant reconsideration, new evidence must be evidence that was not reasonably available to the party

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<sup>8</sup> To the extent that Barrington argues that its "new" evidence demonstrates an increase in vehicular delay due to longer, slower trains, the Board addresses that argument below.



when the record was developed.<sup>9</sup> The alleged new evidence must also mandate a different result. See, e.g., Montezuma Grain Co., 339 F.3d at 542. Here, Barrington presents data extrapolations based on Barrington's 2011 traffic analysis using 2015 and 2016 data sets to show traffic conditions at U.S. 14 in the spring of 2016. Barrington states that these calculations were performed "at some point between February 8 and February 17, 2017." (Barrington Pet. 8.)

Barrington's calculations are not new evidence. The 2015 and 2016 data sets were readily available to Barrington before it filed its January 2017 petition to reopen. Moreover, the underlying calculations were performed in February 2017, which was prior to the filing of its February 23, 2017 surreply and prior to service of the Board's April 2017 Decision. Yet Barrington did not present this evidence until it filed its petition for reconsideration in May 2017. Because the data was readily available to Barrington when the record was developed, the Board finds that these calculations are not new evidence.

Even if Barrington's evidence could be viewed as new evidence, the Board finds that it would not change the outcome of the Board's previous decisions, including the 2008 Final Decision. Barrington's evidence shows less impact on total vehicle delay (118 hours of total vehicle delay per day) than the projections presented in Barrington's 2008 traffic study (135-205 hours of increased vehicle delay), the conclusions of which were already before the Board when it issued its 2008 Final Decision. See 2012 Decision, slip op. at 10-13, aff'd sub nom Barrington II, 758 F.3d at 329. Moreover, exceeding a certain level of vehicle delay at a crossing did not automatically warrant mitigation under the Board's criteria. See 2015 Decision, slip op. at 5, 2012 Decision, slip op. at 10. Indeed, as the Board has noted, total vehicle delay was only one factor in determining if a crossing was eligible for mitigation; it did not mandate mitigation. Rather, the Board considered a range of evidence, studies, and factors in deciding what mitigation conditions to impose in the 2008 Final Decision. 2012 Decision, slip op. at 10-11, 15; see also Barrington II, 758 F.3d at 329. The Board has concluded (on several occasions) that a grade separation at U.S. 14 is not warranted because Barrington's vehicle delays were primarily attributable to preexisting traffic conditions and capacity constraints. 2008 Final Decision, slip op. at 45 & n.101, aff'd Barrington I, 636 F.3d 650; 2012 Decision, slip op. at 12-13, aff'd Barrington II, 758 F.3d 326.

As noted, Barrington's 2011 traffic analysis, upon which Barrington bases its "new" evidence, projected that, under the No-Action alternative (where no CN trains would be added), preexisting capacity constraints in the Barrington street network could cause 260 hours of additional vehicle delay per day at U.S. 14 by 2015. 2012 Decision, slip op. at 12. Thus, even if CN's additional trains have added 118 hours of increased vehicle delay at U.S. 14, Barrington's

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<sup>9</sup> See Toledo, Peoria & W. Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006) (finding that evidence reasonably available before the Board issued its decision is not new evidence). Accord Friends of Sierra R.R. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989); Can. Nat'l Ry.—Control—III. Cent. Corp., 6 S.T.B. 344, 350 (2002) ("'new evidence' is not newly presented evidence, but rather is evidence that could not have been foreseen or planned for at the time of the original proceeding").

own model shows that existing capacity constraints at U.S. 14 would contribute much more significantly to the vehicle delays at that crossing than would additional CN trains on the EJ&E line. Id. Thus, Barrington's evidence, even if it were timely, would not have altered the outcome the Board previously reached.<sup>10</sup>

Ultimately, as discussed in the April 2017 Decision, comparisons of current and future traffic volumes to the 2008 projections of 2015 traffic volume are of very limited value. OEA determined in the EIS that 2015 represented the limit of what was reasonably foreseeable with regard to projected rail traffic on the EJ&E line as a result of the transaction, recognizing that forecasting time horizons that went beyond 2015 would be speculative. Draft EIS 2-27. The Board has recognized that variances from projected data over time are to be expected. April 2017 Decision, slip op. at 7. With nearly a decade since the Board issued its 2008 Final Decision, the causal relationship between CN's acquisition of the EJ&E line and the traffic conditions in Barrington, both current and future, has become more attenuated. Rail traffic may fluctuate over time for many reasons that have nothing to do with the validity of the 2008 projections. Barrington characterizes the Board's approach to CN's future operations, including the possible increase in rail traffic from an expansion of the Port of Prince Rupert terminal, as "shortsighted," but the Board has simply recognized that a variety of other factors unrelated to the transaction, such as changes in industry, economic growth, and energy prices, are now just as likely to play a role in future fluctuations in rail traffic. April 2017 Decision, slip op. at 7. Barrington's alleged "new evidence" concerning rail traffic volumes does not mandate a different result in any of the Board's previous decisions.

Therefore, the Board finds that Barrington fails to present new evidence that would warrant reconsideration.

For these reasons, Barrington's petition for reconsideration is denied.

It is ordered:

1. Barrington's petition for reconsideration is denied.
2. Barrington's motion to supplement the record is granted.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman and Miller.

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<sup>10</sup> Barrington asserts that its evidence shows a 4,639% increase in traffic delay over the No-Action projection in the Final EIS. However, Barrington compares its recent vehicle delay figure, which is based on a VISSIM traffic study, to its original *non*-VISSIM vehicle delay calculation. Because these figures were derived using different methodologies, such a comparison is of extremely limited value.